Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-220 OF 1994
EDGAR JOSEPH JR, CHONG SIEW FAI AND WAN ADNAN FCJJ
7 DECEMBER 1994

Civil Procedure *— Appeal — Assessment of damages — Interference by appellate court — Whether trial judge acted on wrong principle or made entirely erroneous estimate of damages*

Contract *— Damages — Sale and purchase of land — Delay in transfer — Loss of profits — Court to estimate chances that price of land and houses will increase — Whether profit made by purchaser on price increase should be deducted from loss of profits claimed*

Contract *— Damages — Sale and purchase of land — Delay in transfer — Consultant's and surveyor's fees — Whether fees claimable as purchaser had obtained title and would be proceeding with development*

Contract *— Damages — Cash flow investment — Loss due to breach of contractual undertakings — Whether claimable if undertakings are of no effect*

Contract *— Deposit — Interest — Deposit paid under sale and purchase agreement — Agreement found to be binding and deposit became property of vendor — Purchaser could not claim interest for loss of use of deposit*

Civil Procedure *— Appeal — Evaluation of evidence — Conflicting expert evidence on quantification of damages — Approach judge should take — Whether should accept one quantification over the other or take average of both quantifications*

Civil Procedure *— Costs — No order as to costs — Inconsistent arguments by counsel*

The second appellant, Rumah Nanas Rubber Estate Sdn Bhd, had agreed to sell to the respondent, Plenitude Holdings Sdn Bhd, certain land in Johor Bahru for RM47,939,958 for the purpose of development. The first appellant, Tan Sri Khoo, undertook to obtain a loan for the respondent and gave an further undertaking that in the event that he was unable to do so, he and the second appellant would join the respondent in a joint venture to develop the land ('the undertakings'). The respondent paid a deposit of RM4,793,995.80 ('the deposit') but failed to pay the balance purchase price within the stipulated period. The second appellant then terminated the agreement and forfeited the deposit. At the High Court, the trial judge held that the termination was not valid and ordered specific performance of the agreement with damages to be assessed. [See [1992] 2 MLJ 68.] The appellants appealed to the Supreme Court which dismissed the appeal and affirmed the judgment of the High Court. [See [1993] 1 MLJ 113.]

Upon assesment of damages in the High Court, the appellants were ordered to pay: (i) RM62,783.50, being fees paid to the consultants and surveyors, for wrongful termination of the agreement; (ii) RM13.5m for loss of profits; (iii) RM867,969 for loss of cash flow investment; and (iv) RM1,756,772.91 as interest on the deposit. [See [1994] 2 MLJ 273.] The appellants have appealed against the quantum of damages. The issue before the court was whether the basis on which the judge had assessed the damages was right, having regard to the particular circumstances of this case.

Held, allowing the appeal and awarding nominal damages of RM10:

(1) The two situations in which an appellate court would be justified in interfering by reassessment of the damages would be where the trial judge had acted on a wrong principle or had made an entirely erroneous estimate of the damages. In this case, the judge's basis of assessment could not be supported in law.

(2) The correct approach for the judge to have adopted when assessing damages was to make an estimate as to what the chances were of a particular thing happening, ie whether they were more or less even. In this case, with the increased cost of construction, not forgetting that land is limited and is always deemed to have a special value, the chances of the price of houses increasing was part of the ordinary course of things and more than even. Such an approach would have supported the profit projections of the second appellant's expert witness.

(3) There was uncontradicted evidence that the land was worth RM119.5m in 1993. As the contractual price was about RM48m, it was manifestly clear that the respondent would have received a substantial windfall of about RM70m if it had sold the land. The profit which the respondent stood to make on the price increase of the land only because of the breach should, therefore, be deducted from the loss of profits. Not to do so would be to put the respondent in a better position than it would have been in if the contract had been performed in 1988. Upon the evidence, the respondent had not proved its claim for loss of profits.

(4) As the respondent had secured title to the land and would most probably be developing it, the award for fees paid to the consultants and surveyors represented expenses which the respondent would have incurred anyway. The judge should, therefore, have disallowed the claim. Furthermore, the award included sales tax when the law on sales tax for professional services had not yet come into force.

(5) As the respondent was able to raise the purchase price on its own, the undertakings were of no effect. Since the idea underlying the claim for loss of cash flow investment was the proposed joint venture scheme which never materialized, the award under this head must necessarily fail.

(6) As there were concurrent findings by the judge and the Supreme Court that the agreement was never legally terminated, the deposit became the property of the second appellant and the respondent had no right to the use of the money. Therefore, the award for interest on the deposit was set aside.

(7) The judge had assumed that the second appellant's expert had admitted that the respondent had suffered a loss when in truth the witness had said that had development commenced in 1993, the respondent would have made a subtantially larger profit. Furthermore, the judge had averaged the projected profit quantifications of the second appellant's expert witness and that of the respondent's expert witness when he should, in fact, have accepted one quantification over the other.

(8) The appeal was allowed with costs. However, there was no order as to costs in the High Court because of the inconsistent positions taken by the appellants' counsel, ie in the High Court, counsel's primary contention was that some damages ought to be awarded, whereas on appeal, his primary contention was that only nominal damages should be awarded.

[Bahasa Malaysia summary

Perayu kedua, Rumah Nanas Rubber Estate Sdn Bhd, telah bersetuju untuk menjual kepada responden, Plenitude Holdings Sdn Bhd, tanah tertentu di Johor Bahru untuk jumlah RM47,939,958 bagi tujuan pembangunan. Perayu pertama, Tan Sri Khoo, telah berakujanji untuk mendapat suatu pinjaman bagi responden dan memberi akujanji selanjutnya bahawa jika beliau tidak berjaya mendapatkan pinjaman itu, beliau dan perayu kedua akan menubuhkan suatu usaha sama dengan responden untuk membangunkan tanah itu ('akujanji itu'). Responden telah membayar deposit sebanyak RM4,793,995.80 ('deposit itu') tetapi gagal membayar baki harga belian dalam masa yang ditetapkan. Perayu kedua kemudiannya telah menamatkan perjanjian itu dan melucuthakkan deposit itu. Di Mahkamah Tinggi, hakim perbicaraan telah memutuskan bahawa penamatan itu tidak sah dan memerintahkan pelaksanaan spesifik perjanjian itu dengan ganti rugi yang akan ditaksirkan. [Lihat [1992] 2 MLJ 68.] Perayu telah membuat rayuan kepada Mahkamah Agung yang telah menolak rayuan itu dan mengesahkan keputusan Mahkamah Tinggi. [Lihat [1993] 1 MLJ 113.]

Apabila ganti rugi ditaksirkan di Mahkamah Tinggi, perayu telah diperintahkan untuk membayar: (i) RM62,783.50, sebagai fee yang telah dibayar kepada pakar runding dan juruukur, untuk penamatan salah perjanjian itu; (ii) RM13.5m untuk kehilangan keuntungan; (iii) RM867,969 untuk kehilangan pelaburan aliran tunai; dan (iv) RM1,756,772.91 sebagai faedah ke atas deposit itu. [Lihat [1994] 2 MLJ 273.] Perayu telah membuat rayuan terhadap kuantum ganti

rugi. Isu di hadapan mahkamah adalah sama ada asas pentaksiran ganti rugi yang digunakan oleh hakim itu betul, memandangkan keadaan tertentu kes ini. A

Diputuskan, membenarkan rayuan itu dan mengaward ganti rugi nominal sebanyak RM10: B

(1) Dua keadaan di mana sesuatu mahkamah rayuan mempunyai justifikasi untuk bercampur tangan secara mentaksirkan semula ganti rugi adalah di mana hakim perbicaraan telah bertindak mengikut prinsip salah atau telah membuat suatu pentaksiran ganti rugi yang salah sama sekali. Di dalam kes ini, asas pentaksiran hakim itu tidak dapat disokong di sisi undang-undang. C

(2) Pendekatan yang betul yang seharusnya digunakan oleh hakim apabila mentaksirkan ganti rugi adalah supaya membuat suatu anggaran tentang kemungkinan sesuatu kejadian itu akan berlaku, iaitu sama ada cansanya lebih kurang sama. Di dalam kes ini, dengan kos pembinaan yang lebih tinggi, tanpa melupakan bahawa tanah adalah terhad dan selalu dianggap sebagai mempunyai nilai khas, kebarangkalian bahawa harga rumah akan naik menjadi sebahagian daripada keadaan yang biasa dan adalah agak tinggi. Pendekatan sedemikian akan menyokong anggaran keuntungan yang dibuat oleh saksi pakar perayu kedua. D E

(3) Terdapat keterangan yang tidak disangkal bahawa tanah itu bernilai RM119.5 juta pada tahun 1993. Oleh kerana harga kontraknya adalah lebih kurang RM48 juta, adalah jelas bahawa responden akan mendapat suatu durian runtuh sebanyak RM70 juta jika ia menjual tanah itu. Oleh kerana itu, keuntungan yang boleh didapati oleh responden hanya atas kenaikan harga tanah itu sahaja sebagai akibat kemungkiran itu seharusnya ditolak daripada kehilangan keuntungan. Jika itu tidak dilakukan, responden akan diletakkan di dalam kedudukan yang lebih baik daripada kedudukannya jika kontrak itu telah dilaksanakan pada tahun 1988. Atas keterangan yang ada, responden tidak membuktikan tuntutannya untuk kehilangan keuntungan. F G

(4) Oleh kerana responden telah mendapatkan hakmilik kepada tanah itu dan besar kemungkinan bahawa ia akan membangunkan tanah itu, award untuk fee yang dibayar kepada pakar runding dan juruukur itu mewakili perbelanjaan yang bagaimanapun akan dibiayai oleh responden. Oleh itu, hakim itu tidak sepatutnya membenarkan tuntutan itu. Lebih-lebih lagi, award itu termasuk cukai jualan sedangkan undang-undang mengenai cukai jualan atas perkhidmatan profesional belum lagi berkuatkuasa. H

(5) Oleh kerana responden berupaya mendapatkan harga belian dengan sendiri, akujanji itu tidak berkesan. Memandangkan bahawa asas yang mendasari tuntutan untuk kehilangan pelaburan aliran tunai adalah skim usaha sama yang dicadangkan itu yang tidak menjadi kenyataan, award di bawah tajuk ini semestinya gagal. I

(6) Oleh kerana terdapat keputusan yang sejajar oleh hakim dan Mahkamah Agung bahawa perjanjian itu tidak ditamatkan secara sah, deposit itu telah menjadi harta perayu kedua dan responden tidak berhak menggunakan wang itu. Oleh yang demikian, award untuk faedah atas deposit itu diketepikan.

(7) Hakim itu telah membuat anggapan bahawa pakar perayu kedua telah mengaku bahawa responden telah mengalami kerugian tetapi sebenarnya saksi itu telah berkata bahawa jika pembangunan itu bermula dalam tahun 1993, responden akan mendapatkan keuntungan yang jauh lebih besar. Lebih-lebih lagi, hakim itu telah mengambil purata jumlah keuntungan yang dianggarkan oleh saksi pakar perayu kedua dan saksi pakar responden, manakala beliau pada hakikatnya sepatutnya menerima suatu anggaran dan bukan yang lain.

(8) Rayuan ini dibenarkan dengan kos. Walau bagaimanapun, perintah mengenai kos di Mahkamah Tinggi tidak dibuat kerana kedudukan yang diambil oleh peguambela perayu yang tidak konsisten, iaitu di Mahkamah Tinggi, penegasannya yang utama adalah bahawa sejumlah ganti rugi seharusnya dibenarkan, manakala pada rayuan ini, penegasannya yang utama adalah bahawa hanya ganti rugi nominal sahaja yang seharusnya diawardkan.]

Notes

For cases on damages, see 3 *Mallal's Digest* (4th Ed, Reissue) paras 1442–1494; [1993] Mallal's Digest 464–468.

For cases on appeals, see 2 *Mallal's Digest* (4th Ed) paras 183, 235; [1992] Mallal's Digest 173; [1993] Mallal's Digest 126–127.

For cases where no orders as to costs were made, see 2 *Mallal's Digest* (4th Ed) paras 654–655; [1991] Mallal's Digest 247–248; [1993] Mallal's Digest 154.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 (folld)

Bonham-Carter v Hyde Park Hotel Ltd 64 TLR 177 (folld)

Bowlay Logging Ltd v Domtar Ltd [1978] 4 WWR 105 (folld)

C & P Haulage v Middleton [1983] 3 All ER 94; [1983] 1 WLR 1461 (folld)

Cochrane Decorators Ltd v Sarabandi (1983) 133 New LJ 588 (refd)

Cottrill v Steyning and Littlehampton Building Society [1966] 2 All ER 295; [1966] 1 WLR 753 (folld)

Cullinane v British 'Rema' Manufacturing Co Ltd [1954] 1 QB 292; [1954] 2 All ER 1257; [1953] 3 WLR 923 (folld)

Davies v Powell Duffryn Associated Collieries (No 2) [1942] AC 601 (folld)

Flint v Lovell [1935] 1 KB 354 (folld)

Hadley v Baxendale (1854) 9 Ex 341; 156 ER 145 (folld)

Jaques v Millar (1877) 6 Ch D 153 (refd)
John v Dharmaratnam [1962] MLJ 187 (follld)
Johnson v Agnew [1980] AC 367; [1979] 1 All ER 883; [1979] 2 WLR 487 (follld)
Koufos v C Czarnikow Ltd [1969] 1 AC 350; [1967] 3 All ER 686; [1967] 3 WLR 1491 (refd)
Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569 (follld)
Mallett v McMonagle [1970] AC 166; [1969] 2 All ER 178; [1969] 2 WLR 767 (follld)
Monarch Steamship Co v Karlshamns Oljefabriker [1949] AC 196; [1949] 1 All ER 1 (follld)
Nance v British Columbia Electric Railway Co [1951] AC 601 (follld)
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (follld)
Robinson v Harman [1843–60] All ER Rep 383; (1848) 1 Ex 850; 154 ER 363 (follld)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 (refd)
Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1992] 2 MLJ 68 (refd)
Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1994] 2 MLJ 273 (overd)
Wenham v Ella (1972) 127 CLR 45 (follld)

Legislation referred to

Contracts Act 1950 s 74
Specific Relief Act 1950 s 18
Specific Relief Act 1877 s 19 [Ind]
Lord Cairns' Act s 2 [UK]

Porres Royan (*Robert Lai with him*) (*Jackson & Masacorale*) for the apellant.

Wong Kim Fatt (*Christina Chia* and *KC Tho* with him) (*Gulam & Wong*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering the judgment of the court):

The background facts

This judgment relates to the proceedings which were a sequel to the judgment of the Supreme Court, dated 23 February 1993, reported under the name of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* in the *Malayan Law Journal*, the citation being [1993] 1 MLJ 113, and arose in this way:

In the High Court at Johor Bahru, on 23 February 1992, the learned judge had, in a persuasive judgment (reported in [1992] 2 MLJ 68), made an order for specific performance of a contract for sale and purchase of

A land dated 20 August 1984 ('the agreement') whereby the second defendant, Rumah Nanas Rubber Estate Sdn Bhd ('the vendor'), had agreed to sell to the plaintiff, Plenitude Holdings Sdn Bhd ('the purchaser'), certain land comprised in Lot No 295 held under Grant No 17259, situated in the Mukim of Tebrau, in the District of Johor Bahru, in the State of Johor, in
B area approximately 1,000 acres ('the land') at a price of RM47,939,958. The judge had made a further order that the vendor do pay damages to the purchaser to be assessed for wrongful termination of the agreement and yet another order that the vendor and the first defendant, Tan Sri Khoo Teck Puat ('Tan Sri Khoo'), the chairman of the vendor company, do pay damages to the purchaser for breach of certain oral undertakings.

C By these undertakings, Tan Sri Khoo, on his own behalf and on behalf of the vendor, had promised to obtain a loan from the National Bank of Brunei or another source, to enable the purchaser to pay the balance of the purchase price ('the loan undertaking') and further, by way of alternative, that in the event of their being unable to secure such a loan,
D then Tan Sri Khoo had promised that his company, the vendor, would enter into a joint venture scheme to develop the land ('the joint venture undertaking') and this, in turn, would have required the incorporation of a company, with the purchaser and the vendor having a 10% and 90%, equity therein, respectively.

E The appeal by Tan Sri Khoo and the vendor from the orders of the judge aforesaid to the Supreme Court had been dismissed on 23 February 1993 on the grounds appearing in its judgment in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113.

Upon dismissal of the appeal aforesaid, the purchaser had paid the
F balance of the purchase price of RM43,145,962.20, without recourse to the loan undertaking, with the result that the land had been transferred to the purchaser, which became the registered proprietor thereof, though only with effect from 17 March 1993.

Pursuant to the consequential orders of the judge aforesaid, the
G purchaser had filed a summons for assessment of damages and, upon the hearing thereof, the judge had ordered that Tan Sri Khoo and the vendor do pay to the purchaser the following sums of money:

(1) RM31,000 and RM31,783.50 for wrongful termination of the agreement;

H (2) RM13.5m for loss of profits;

(3) RM867,969 for loss of cash flow investment; and

(4) the sum of RM1,756,772.91 by way of interest on the deposit which had been paid by the purchaser to the vendor under the agreement.

In addition, the judge had also ordered the payment of interest on the
I above amounts.

It is from the above orders of the judge made upon the summons for assessment of damages, the reasons for which appear in his subsequent judgment, reported in [1994] 2 MLJ 273, that the present appeal had been brought by Tan Sri Khoo and the vendor. There is also a cross-appeal by

the purchaser against the order of the judge awarding the sum of RM13.5m for loss of profits, on the ground of its alleged inadequacy. A

The basic issue

It is indisputable, and indeed it was common ground, that in law, in appropriate circumstances, compensation may be awarded against a vendor in addition to specific performance. (See s 18 of the Specific Relief Act 1950 (Rev 1974) which is based on s 19 of the Indian Specific Relief Act 1877, which in turn, has its roots in s 2 of Lord Cairns' Act and *Jaques v Millar* (1877) 6 Ch D 153). B

The appeal and the cross-appeal being only on quantum, the basic issue is whether the basis on which the judge had assessed the damages was right, having regard to the particular circumstances of this case. C

Preliminary points

Before we embark upon a detailed consideration of the specific issues which arise for decision, there are three *preliminary matters* which, at the outset, require emphasis. D

Firstly, that part of the judgment which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs *and* that Tan Sri Khoo and the vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having *to prove its loss* (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 at p 178: E F

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it. G

This dictum was referred to and applied by our Court of Appeal in *John v Dharmaratnam* [1962] MLJ 187.

And, in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, the court had occasion to say this (at p 367):

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see Marzetti v Williams 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v Deveridge* (1825) 2 C & P 109; 172 ER 50 and *Twyman v Knowles* 138 ER 1183. H I

In *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 at p 582E–F, Mohamed Dzaiddin SCJ, speaking for the Supreme

Court, quoted, with approval, the above passage in the *Popular Industries* case.

Secondly, it is important to identify the real nature of the purchaser's *cause of action*.

It was held by the High Court, and affirmed on appeal, that though the vendor had purported to terminate the agreement, it was not entitled to do so, with the result that specific performance had been ordered of the agreement. The effect of this was that the agreement was affirmed by the court and so it remained alive and on foot throughout. In the event, instead of obtaining title to the land in 1988 as stipulated in the agreement, the purchaser did so only on 17 March 1993. This meant that the purchaser had to wait for five years before it could obtain title to the land and embark upon its development project. Clearly, the purchaser's cause of action was for damages for delay in completion. That delay was brought to an end by the decree for specific performance against the recalcitrant vendor. We find, quite apt, the following passage in *McGregor on Damages* (15th Ed) para 911 at p 914:

> ... More often he (the purchaser) will have the property transferred to him late, either because the delay does not discharge the contract or he elects not to treat the delay as a discharge, or because he forces the seller's hand by successfully suing for a decree of specific performance. In such a situation the measure of damages is properly regarded as damages for delay.

At this point, we would pause to refer to the loan undertaking, the *object* of which was clearly to enable the purchaser to obtain title to the land. On the other hand, the *object* of the alternative undertaking, namely, the joint venture undertaking, was to ensure that if the purchaser failed to get title to the land, then at least it would be entitled to participate in a joint venture scheme involving the land, with the purchaser and the vendor having a 10% and a 90% equity therein, respectively. In other words, the agreement contemplated that if the purchaser secured title to the land without recourse to the loan undertaking, this undertaking would lose its importance, and similarly, resort to the joint venture undertaking would not even arise.

In the event, the purchaser did succeed to obtain title to the land, although belatedly, and after forcing the hand of the vendor, by way of an order for specific performance, but without recourse to the loan undertaking. This leads to the inevitable conclusion that the purchaser's true cause of action was for damages for delay in delivering title as a result of the wrongful termination of the agreement by the vendor.

In such a situation, neither undertaking was of anything more than historic interest; the loan undertaking was a breach without consequence, no evidence having been led as to what, if any loss, had been occasioned thereby; whilst the joint venture undertaking was inoperative and of no effect.

In this context, we find the following words of Lord Wilberforce in *Johnson v Agnew* [1980] AC 367 at p 392; [1979] 1 All ER 883 at p 889; [1979] 2 WLR 487 at pp 491H–492A, apt:

In this situation it is possible to state at least some uncontroversial propositions of law. A

First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the B contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.

C

Accordingly, the assessment of damages in this case should be arrived at having regard to the loss, if any, which the purchaser *had suffered and proved*, by reason of it not having obtained title to the land until after the order for specific performance passed by the High Court had, on appeal, been affirmed by the Supreme Court. It is vitally important that this point be kept in the forefront of our minds as failure to do so will lead to D confusion and injustice.

Thirdly, by way of elaboration, it should be added that the effect of the undertakings was that if the purchaser had been able to raise the balance of the purchase price in time, whether with or without the assistance of Tan Sri Khoo, there would be no joint venture scheme. But, if the E purchaser had been *unable* to raise the balance of the purchase price in time, whether with or without the assistance of Tan Sri Khoo, there was to be a joint venture scheme, in which case, the land would have been transferred to a joint venture company with the purchaser and the vendor having 10% and 90% equity therein, respectively.

F

In the events which transpired, the purchaser *had* been able to raise the balance of the purchase price, *suo motu*, that is to say, on its own and so without any assistance from Tan Sri Khoo, and to obtain an order for specific performance of the agreement, with the result that the purchaser did not have to rely on either undertaking, which had been overtaken by events. G

To put it another way, the purchaser did not accept the vendor's repudiation of the agreement, sue only for damages for breach, dropping any claim for specific performance. Had it done so, the undertakings would have occupied centre stage and the consequences of the vendor's breaches of the undertakings would have been most material in the H assessment of damages.

To illustrate, if as a result of a breach of the loan undertaking, the purchaser could not, *suo motu*, have obtained a loan from other sources and there had been a breach of the alternative joint venture undertaking to enter into a joint venture scheme, then a claim for 10% of the profits (if any) accruing therefrom, would lie. I

But, because the purchaser had been able, *suo motu*, to raise the balance of the purchase price which had been duly paid pursuant to the order of court granting specific performance of the agreement, thus obtaining

A title to the land, the loan undertaking, even though breached, was of no consequence, since no evidence had been led as to what, if any, loss had been sustained thereby. To illustrate, if as a result of a breach of the loan undertaking, the purchaser could only have obtained a loan from other sources at a higher rate of interest, a claim for reimbursement of the excess interest would lie.

B

As Berger J said in the British Columbia Supreme Court case of *Bowlay Logging Ltd v Domtar Ltd* [1978] 4 WWR 105 at p 117:

> If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce.
>
> The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise. ... The fundamental principle upon which damages are measured under the law of contract is restitutio in integrum. The principle contended for here by the plaintiff would entail the award of damages not to compensate the plaintiff but to punish the defendant.

C

D

In the case of the joint venture undertaking, no question of a joint venture scheme could have arisen considering that the purchaser was able, *suo motu*, to raise the balance of the purchase price and to obtain title to the land with the result that the joint venture undertaking (which was an alternative undertaking) was inoperative and of no effect. There could be no question of the purchaser having the land and also a joint venture scheme.

E

It is against the backdrop of the three preliminary matters that we must embark upon a consideration of the individual heads of award made by the judge. But, before doing so, it would be salutary to remind ourselves of certain well-established principles governing the measure of damages for breach of contract.

F

The governing principles

G

The starting point regarding this part of the case is s 74 of the Contracts Act 1950 (Rev 1974), which is really declaratory of the common law rules enunciated in the celebrated case of *Hadley v Baxendale* (1854) 9 Ex 341 at p 354; 156 ER 145 at p 151. (See *Bank Bumiputra Malaysia Bhd v Mae Perkayuan Sdn Bhd* [1993] 2 MLJ 76 at pp 87–91).

H

At common law, the general principle which constitutes the starting point in the assessment of damages for breach of contract is, in the words of Parke R in *Robinson v Harman* [1843–60] All ER Rep 383 at p 385; (1848) 1 Ex 850 at p 855; 154 ER 363 at p 365, 'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed'. This was cited with approval by the Court of Appeal in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at pp 414 and 420; [1967] 3 All ER 686 at pp 710 and 714; [1967] 3 WLR 1491 at pp 1527 and 1532.

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But, the general principle aforesaid has been qualified and limited by *Hadley v Baxendale* where the principles enunciated are these:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Explaining the distinction between the first and the second rules in *Hadley v Baxendale*, Lord Wright said this in *Monarch Steamship Co v Karlshamns Oljefabriker* [1949] AC 196 at p 221; [1949] 1 All ER 1 at pp 12–13:

> The distinction there drawn [viz in *Hadley v Baxendale*] is between damages arising naturally (which means in the normal course of things) and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties: in the latter event it is laid down that the special facts must be communicated by and between the parties. The distinction between these types is usually described in English law as that between general and special damages; ...

It goes without saying that if the effect of allowing a plaintiff's claim is to put him in a better position than he would have been if there had been no breach, then this would be contrary to the principles enunciated in the cases cited above. This means that *any profit which he stands to make because of the breach, must be deducted from the damages awarded* — a point apply put by Mr Hugh Beale in his most useful book on *Remedies for Breach of Contract*:

> The basis of assessment
>
> In outline, the victim of a breach of contract is entitled to compensation for any loss which results from the breach and which is neither too 'remote', or unlikely, a consequence nor one which he could have avoided by taking reasonable steps in 'mitigation'. He is 'to be placed in the same situation as if the contract had been performed' (*Robinson v Harman* (1848) 1 Ex 850 at p 855). This involves considering his overall position. The damages should compensate him for the performance which he should have received but has not, with deductions for any savings he has or should have made through not having to perform himself or by other action, such as entering a substitute transaction with someone else. *Any profit which he is only able to make because of the breach of contract should also be deducted.* These deductions are made in accordance with the general principle that an award of damages should not put the victim in a better position than if the contract had been performed; he should recover no more than he has lost. Punitive or exemplary damages might be awarded where a breach of contract was also a tort, but in English law they are not awarded for a mere breach of contract (*Perera v Vandiyar* [1953] 1 WLR 672). (Emphasis added.)

Also relevant in this context is what Ackner LJ said in the Court of Appeal case of *C & P Haulage v Middleton* [1983] 3 All ER 94 at pp 98–100; [1983] 1 WLR 1461 at pp 1466–1468:

A [Middleton] is not claiming for the loss of his bargain, which would involve being put in the position that he would have been in if the contract had been performed. He is not asking to be put in that position. He is asking to be put in the position he would have been in if the contract had never been made at all. If the contract had never been made at all, then he would not have incurred these expenses, and that is the essential approach he adopts in B mounting this claim; because if the right approach is that he should be put in the position in which he would have been had the contract been performed, then it follows that he suffered no damage. He lost his entitlement to a further ten weeks of occupation after 5 October, and during that period he involved himself in no loss of profit because he found other accommodation, and in no increased expense — in fact the contrary — because he returned C immediately to his own garage, thereby saving whatever would have been the agreed figure which he would have to have paid the plaintiffs.

... It is not the function of the courts where there is a breach of contract knowingly, as this would be the case, to put a plaintiff in a better financial position then if the contract had been properly performed. In this case the defendant ... would indeed be in a better position because, as I have already D indicated, had the contract been lawfully determined as it would have been in the middle of December, there would have been no question of his recovering these expenses.

... I do not consider that a plaintiff is entitled in an action for damages for breach of contract to ask to be put in the position in which he would have been if the contract had never been made. Accordingly, save in the E respect to which I have already made reference, namely, that there should be judgment for the defendant for nominal damages of £10, I would dismiss the appeal.

It is with the above principles in mind that we turn to consider the individual heads of award made by the judge.

F

The award of RM13.5m for loss of profits

In making this award, the judge said this ([1994] 2 MLJ 273 at p 281):

In the instant case, the facts are somewhat similar to the *Bank Bumiputra* case [1993] 2 MLJ 76. The defendants knew at the time the contract was G executed that if there was a breach of contract and they did not honour their undertakings, the plaintiffs would suffer a loss, as the land had been purchased with a view to developing it into a housing project. The loss suffered by the plaintiffs was a natural and probable result of the defendant's breach of the contract.

H More particularly, in giving his reasons for making this award, the judge said this ([1994] 2 MLJ 273 at pp 279–280):

Sometime in the middle of 1987, the plaintiffs and the defendants after some discussions, agreed to implement a joint venture scheme between the respective parties. The plaintiffs would hold a 10% share in that scheme and the defendants would hold a 90% share.

I

As the plaintiffs had a 10% share in the joint development scheme with the defendants, the profits derived from the scheme would accordingly be 10% of the total gross profit before tax. PW1 stated that the total sales revenue projected by him was RM645,935,000. The total expenditure

projected was RM421,625,000 and the gross profit before tax would amount to RM224,300,000. The plaintiffs' share of the profit would amount to 10% x RM224,300,000 or RM22,430,000.

The defendants called a witness Lim Wooi Hwee (DW1). She stated that she was a certified public accountant and was attached to a firm of accountants since 1979. She had prepared a report in regard to her findings which was marked as D4. In her evidence and her report, she stated that if the project had commenced in 1988, the profit of the plaintiffs would be RM15,797,000 and this would be the loss of profit of the plaintiffs.

And, later he concluded ([1994] 2 MLJ 273 at p 282):

There have been two different computations in regard to the loss of profits made by PW1 and DW1. Taking all factors into consideration, I take an average of the two figures relating to the loss of profits on the basis that the project started in 1987/88. The average of the two figures relating to the loss of profits amounts to RM19,113,500. However, there could be adverse conditions affecting the anticipated profits and a deduction of a reasonable percentage of 30% should be applied to the sum which is thereby reduced to a round figure of RM13.5m. I accordingly award the plaintiffs a sum of RM13.5m as damages for loss of profits.

With respect, the judge appears to have *assumed*, as did leading counsel for the purchaser before us, that, it was admitted by the vendor's expert, Miss Lim (DW 1), that the purchaser *had suffered* a loss of profits, amounting to RM15.8m. In truth, Miss Lim made no admission of the sort.

On the contrary, the gist of Miss Lim's testimony was that the estimated share of the purchaser's profits — had development commenced in 1988 when completion should have but did not take place — would have been a sum in the region of RM15.8m before tax, *whereas* had construction commenced in 1993, when it secured title to the land, belatedly, due to the recalcitrance of the vendors and the consequent litigation — it would have made a substantially larger profit, to wit, RM23.2m before tax.

In other words, according to Miss Lim, far from the purchaser suffering any loss of profits as a result of the delay, had it commenced the project in 1993, it would most probably have made a substantial increase in profit of RM7.4m.

To revert to the judgment of the court below, it is a curious fact, that while the judge said that he preferred the testimony of the purchaser's own expert, Mr Song, an accountant in the permanent employment of the purchaser, who was very far from being a disinterested witness, to that of the vendor's expert, Miss Lim, an accountant in the employment of Messrs Coopers & Lybrand, a well-known firm of chartered accountants, on account of the former's superior experience in the construction field, yet when it came to the crunch, his approach was to strike a compromise, that is to say, he took an average of the two estimates of the two experts as to profits likely to have accrued to the purchaser had the project commenced in 1988. In other words, he gave precisely the *same weight* to the testimony of these two experts. He concluded by making a deduction of 30% to allow for contingencies.

A The next point to note is the different *approaches* adopted by the rival experts in arriving at their conclusions as to the measure of damages.

In particular, Mr Song's approach was to confine his estimate to the profits which he considered would have accrued to the purchaser had the project commenced in 1988, studiously ignoring altogether the amount of B profits which would have accrued to the purchaser had the project commenced in 1993 — the year in which the purchaser had secured title to the land — and this, notwithstanding cross-examination on that omission.

On the other hand, Miss Lim's approach was to make a *comparison* between the profits which would have accrued to the purchaser had the C project commenced in those years, ending with the uncontradicted conclusion that the purchaser's profits would have been more by RM7.4m (RM23.2m - RM15.8m) had the project commenced at the later stage.

The feasibility of the purchaser having commenced the development in 1993 was manifestly evident from the following admissions made by D Mr Song, under cross-examination at the trial (held in 1993), namely, that 'the land is still available for the purpose of a housing project'. And also, 'The land was purchased by the plaintiffs for a housing scheme. The name of the scheme was referred to as Pekan Yayasan in 1987 ... If conditions are right, we intend to develop the land'. Considering the area and location of the land — approximately 1,000 acres and just eight miles from the city E centre of Johor Bahru — there is more than a ring of truth in these admissions.

There was also uncontradicted evidence in the shape of a valuation report dated 23 July 1993 by the vendor's quantity surveyor, Mr K Parampathy (DW2), showing that the land was ripe for housing development in F September 1987. The agreement, it will be recalled, was dated 20 August 1984. In his report, Mr K Parampathy had stated that:

(1) the first stage, 'approval-in-principle', for a housing scheme had been secured from the state authority on 16 December 1984;

G (2) second stage approval, supported by layout and technical plans, had been secured from the state authority on 17 August 1985; and

(3) the final approval for the layout plan had been secured from Jabatan Perancang Bandar dan Desa, Johor, on 21 September 1987.

Furthermore, the judge had conceded that the comparison approach H adopted by Miss Lim was 'attractive', but criticized her computation for 1993, because she had *not* taken into account the probable increase in the cost of building materials. But, the judge had overlooked to note that as against that, Miss Lim did not take into account the probable increase in the *price* of dwelling houses in 1993.

I The judge also criticized the comparison approach adopted by Miss Lim on the ground 'that no consideration was given to the fact that between 1993 and 2001 there could be many fluctuating market conditions that may well render the project a failure financially' ([1994] 2 MLJ 273 at p 281).

But, in this mortal world, virtually anything is possible, and the correct approach for the judge to have adopted when assessing damages, which depends upon a view of what will happen in the future, is that the court must make an estimate as to what are the chances that a particular thing will happen, and whether they are more or less than even. In this, we are supported by the following passage in the judgment of Lord Diplock in *Mallett v McMonagle* [1970] AC 166 at p 176; [1969] 2 All ER 178 at pp 190–191; [1969] 2 WLR 767 at p 772:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

Had the judge adopted this approach, as he undoubtedly should have — looking ahead over a period of some eight years commencing in 1993, with the increase in the cost of construction, both in terms of material and labour, not forgetting that land is always deemed in law to have a special value and is in the nature of things, absolutely limited, given continuing political stability, the chances of the price of houses increasing was part of 'the ordinary course of things', and so, in the words of Lord Diplock, 'more than even'. Such an approach would have supported Miss Lim's projections.

Indeed, there is authority to show that the comparison approach adopted by Miss Lim has much to be said for it. We refer to the case of *Cochrane Decorators Ltd v Sarabandi* (1983) 133 New LJ 588, where on the facts, in a sale of land situation, a delay in completion had led to a *reduction* of profit, and it was held that the purchaser was entitled to recover. The summary of the case reported in the *New Law Journal* dated 17 June 1983 at p 558 reads as follows:

> *Sale of land: Delay in completion*
>
> In September 1979, a property owned by S was advertised for sale for £150,000 as being suitable for conversion. It was subsequently sold to C Ltd for £142,500. Completion was to be on 2 January 1980, but, in fact, was delayed until 10 November 1980. C Ltd had planned to make a profit of £100,000 on the conversion of the property into flats, but on account of the delay in completion, they made a loss of £25,000 for building costs had increased considerably and the one-time buoyant property market was going into a decline. C Ltd now claimed damages from S.
>
> It was held (Stabb J) that damages of £112,000 would be awarded. Damages for delay in completion was a perfectly permissible cause of action. S knew that the purchase of the property was made by C Ltd for the purpose of converting it into flats. It was within the contemplation of the

A parties that the conversion was to be carried out for profit. Any breach of contract which led to a reduction of that profit would be damages which would properly be termed as having been in the contemplation of the parties at the time of the making of the contract. (*Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 295, and *Raineri v Miles (Wiejski & Anor, third parties)* [1980] 2 All ER 145, applied.)

B It is true that in the *Cochrane* case, the purchaser was held entitled to recover for loss of profits due to *delay* in completion. But we fail to see any distinction in principle to prevent the same approach being adopted to demonstrate that the delay in completion had resulted not in a reduction but an *increase* in profits, which might go to show that the purchaser had C in fact suffered no loss by reason of the breach of the agreement and, indeed, would be in a better position than if the agreement had been performed. In this, we are supported by the passages in the judgment of Ackner LJ in *C & P Haulage v Middleton* [1983] 3 All ER 94; [1983] 1 WLR 1461, quoted above.

D Even more important than the evaluation of the testimony of Mr Song and Miss Lim was the testimony of the vendor's chartered surveyor, Mr K Parampathy, who gave uncontradicted testimony that the land was worth RM119,560,000 at the time of the trial, that is to say in 1993. When this fact was put to Mr Song by counsel for the vendor, he did not deny it but merely said that he did not know.

E Considering that the contractual price in this case was just under RM48m, it is manifestly clear that far from suffering any loss by reason of the delay in the completion of the sale, the purchaser in this case had received a very substantial windfall of about RM70m if, for example, it had sold the land instead of developing it. This sum would, of course be F considerably more than the measure of profits of RM22.4m estimated by Mr Song as having been lost by the purchaser. In this context, we fail to see how the notice of assessment of the assistant collector of stamp duty, being exh P5, could in any way assist the purchaser since it merely states that the market value of the land had been estimated by the valuation department of the Inland Revenue Department to be RM67m at the date G of the agreement which was dated 20 August 1984, for purposes of stamp duty.

Nevertheless, it was submitted by counsel for the purchaser that the fact that the price of the land had appreciated substantially should be ignored as being irrelevant in the assessment of damages. In other words, H the effect of counsel's submission is that events after the breach should never be considered when the court assesses the quantum of damages. With respect, this view is not shared by the High Court of Australia for in *Wenham v Ella* (1972) 127 CLR 454, Gibbs J said at pp 473–474:

I The general principle that damages are normally measured by reference to the circumstances at the date of the breach of contract does not mean that events that have occurred after that date may never be considered. The appellants' contention on this point, if correct, would mean that evidence could never be given of the amount of profits lost as the result of a breach and that the everyday practice of receiving evidence as to the damage that

> had in fact flowed from a breach and as to steps that were or could have been taken to mitigate a loss is erroneous. However, the evidence as to the income in fact lost by the breach was in my opinion plainly admissible ...

Moreover, counsel for the purchaser's submission regarding this part of the case is flatly contradicted by Prof Hugh Beale who has pointed out in his book, *Remedies for Breach of Contract*, '*Any profit* which he is only able to make because of the breach of contract should also be deducted' (emphasis added). (See the passage quoted in full, supra.) And, similarly, as Ackner LJ has pointed out in *C & P Haulage v Middleton* [1983] 3 All ER 94 at p 99; [1983] 1 WLR 1461 at p 1467:

> It is not the function of the courts where there is a breach of contract knowingly, ... to put the plaintiff in a better financial position than if the contract had been properly performed.

It was further submitted by counsel for the purchaser that the purchaser required the land not for sale but for development. But this contention overlooks the point that the purchaser was a developer which required the land to develop for profit in which event it would have been sold.

Cottrill v Steyning and Littlehampton Building Society [1966] 2 All ER 295; [1966] 1 WLR 753 provides an illustration of recovery for loss of profits eventually, where the contract was for sale of land to a purchaser who carried on the business of development and to the knowledge of the vendor required the land to develop for profit but there had been a failure to complete and the vendor in breach of contract had conveyed the land to a third party.

In assessing damages for loss of profits, Elwes J took into consideration the market value of the land at the date of the proposed development less expenses attributable to the carrying out of the development. The following passages in his judgment show his reasoning ([1966] 2 All ER 295 at p 298; [1966] 1 WLR 753 at p 756):

> It is clear, in my opinion, that if the defendants are shown to have known that the plaintiff intended to develop the land for profit special circumstances are established which entitle the plaintiff to have the damages assessed by reference to the profits which both parties contemplated he would make.

And, in the final paragraph he concluded as follows ([1966] 2 All ER 295 at p 298; [1966] 1 WLR 753 at p 757):

> I accordingly direct, on the basis of reasonable probability, that the damages should be assessed on the footing that planning permission would have been granted six months after 10 May 1957, the date of the plaintiff's return from abroad, and that the required modifications of the tree-preservation order would have been made; that the plaintiff would have been able to proceed with his plan to turn the hotel into flats and build six dwelling houses, and that such building and alteration would have been completed within 18 months of 10 May. The market value of the property is to be ascertained accordingly and the damages assessed at that figure less the expenses attributable to the building work and all matters ancillary thereto. There will be judgment for the plaintiff.

A Similarly, here, assuming the vendor had, in breach of contract, sold the land to a third party, the purchaser's loss would have been measured by the principles enunciated in *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145. Therefore, in such a situation, since the vendor knew at the time of the agreement of the purchaser's intention to develop the land for profit, it would be liable to indemnify the purchaser for loss of those profits it would have made in 1988 as was the case in *Cottrill*'s case.

But, unlike *Cottrill*'s case, under the order of the judge, not only has the purchaser got the land and also the profits which the purchaser would have made had sales taken place in 1988 *but* in addition to that, after final conversion and sub-division, the purchaser would be making the sales at current rates. It follows that the value of the land in 1993 after final conversion and sub-division estimated by Mr K Parampathy at RM119,560,000 would be relevant as this is tied to the price of sales at current rates.

On the other hand, if the purchaser had stood to make more profits in 1988 as compared to 1993, then clearly it would be entitled to be reimbursed by the vendor in respect of the difference since this would represent its loss. By the same token, in a converse situation, if the purchaser stands to make more profits from sales in 1993, reason and justice point to the conclusion that this too should be taken into account and the vendor given credit for it. Therefore, the value of the land in 1993 would also be relevant, as this, too, would be tied to the price of sales at current rates.

In considering the overall position of the purchaser, the court should not wear blinkers and ignore the fact that the purchaser stands to make a substantial profit on the price increase of the land alone only because of the breach of contract, which should, therefore, be deducted from the loss of profits. Not to do so would be to put the purchaser in a better position than it would have been in if the contract had been performed in 1988. Also, to countenance such a claim by the purchaser would amount to countenancing a claim for double recovery.

In short, upon the evidence, the purchaser had not proved its claim for loss of profits.

It follows that the award for loss of profits under this head must be, and is, set aside.

The awards of RM31,000 and for RM31,783 by way of reimbursement of fees for the engineer and the surveyor, respectively, each of which included an element of service tax

The basis of the purchaser's claim which resulted in these two awards, was that they represented costs thrown away, that is to say, wasted expenses. But when it is remembered that the purchaser had also claimed for loss of profits and that now that it has secured title to the land, and most probably will be proceeding to develop the land for profit, these two awards represent expenses which the purchaser would have incurred anyway. In other

words, these two awards do not represent wasted expenses or costs thrown away.

The object of damages is to restore a plaintiff to the position he would have been in but for the wrong. When, as here, the purchaser has claimed loss of profits for anticipated sales, it would have to be assumed that these two awards are based on expenses which would have been incurred anyway. This point was made in *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292; [1954] 2 All ER 1257; [1953] 3 WLR 923 where it was held that a plaintiff could not claim both his capital loss, ie expenditure incurred, as well as his loss of gross profits. The plaintiff was required to choose between his two claims; in other words, he would have to elect between being put back into the position he would have been if the contract had not been made, that is to say recover his net outlay or claim what he would have received if the contract had been made, that is to say, recover his gross profits on lost sales.

It is also worth mentioning that these awards included an element of sales tax, although at the material time, the law under which sales tax for professional services rendered had not yet come into force.

The judge should, therefore, have disallowed both these claims for the reasons stated, and we would accordingly set aside these awards.

The award of RM1,756,772.91 being loss of interest on the 10% deposit paid under the agreement

The judge considered that the vendor 'by wrongfully terminating the agreement must in all fairness compensate the plaintiff'.

With respect, there were concurrent findings both by the judge and the Supreme Court that the agreement was never legally terminated. Both courts went on to hold that the purchaser was entitled to specific performance of the agreement and, consequent thereto, the purchaser had obtained title to the land, although belatedly. At all material times, the purchaser had treated the agreement as being alive and on foot and was vindicated by both courts with the result that the deposit became the property of the vendor, the purchaser having no right to the use of the money.

It follows that the award under this head of claim was, with respect, quite untenable — a point, which incidentally, had been conceded by counsel for the purchaser — and must be, and is, set aside.

The award of RM867,969 for loss of cash flow investment

The rationale or basis of this claim is that the purchaser's surplus cash could be invested in short-term money market securities.

The judge made this award by averaging the sum of RM325,000 quantified by the vendor's expert, Miss Lim, and the sum of RM1,410,900 quantified by the purchaser's expert, Mr Song.

It was submitted by counsel for the purchaser, and we agree, that this was not the correct approach for the judge to have adopted.

A When, as here, there was a conflict of expert testimony, the correct approach for the judge to have adopted was not to cut the Gordion knot, as it were, by averaging out the two quantifications aforesaid, but by analysing the reasoning of the rival experts, and then concluding by accepting the version of one over the other.

B We have already referred to the fact that the anticipated profits of the project, had it commenced in 1993, would have been substantially higher than if the project had commenced in 1988, so that on the basis of Miss Lim's testimony, the sum of RM325,000 would have been offset by the higher profits.

C But, more to the point, the idea underlying this head of claim was the concept of the joint venture scheme with the purchaser and the vendor, having a 10% and a 90% equity therein, respectively. However, as events turned out, the concept of a joint venture scheme never materialized, since the purchaser did, indeed, secure title to the land. If the concept of a joint venture scheme failed then this award must necessarily fail.

D We would accordingly set aside this award as being based on a misconception.

The purchaser's cross-appeal

E In this cross-appeal, counsel for the purchaser had contended that when assessing damages for loss of profits in the manner he had done the judge should not have made a deduction of 30% to allow for contingencies. A more appropriate deduction, so he said, would have been one of 5% or 10%, in which case, the resulting sum would have been at least RM19m.

F In view of our conclusions in the principal appeal on the award for loss of profits made by the judge, the cross-appeal must fail and is accordingly dismissed.

In retrospect

G Stepping aside and taking a second hard look at this case and considering the overall position of the parties, we would summarize the probable scenarios past, present and future as follows.

Broadly stated, the question for decision before us is whether the basis upon which the judge had assessed the damages was right. In H considering this question it would be essential to keep in the forefront of our minds the guidance provided by Lord Diplock in *Mallett v McMonagle* [1970] AC 166; [1969] 2 All ER 178; [1969] 2 WLR 767 as to the role of the court in making an assessment of damages, quoted above.

First of all, it is necessary to consider what might have happened if I Tan Sri Khoo and the vendor had punctually performed their obligations under the loan undertaking provided for in the agreement. In such a situation, the loan would have been arranged to enable the purchaser to complete the purchase, and upon payment of the balance of the purchase price to the vendor, the land would have been transferred to the purchaser

in 1988, whereupon the purchaser would have been in a position to commence development in the same year or the next. A

Secondly, and in the alternative, what would have happened if no loan had been arranged by Tan Sri Khoo to enable the purchaser to pay the balance of the purchase price and to complete the purchase?

In such a situation, assuming compliance by the vendor with the joint venture undertaking, which was an alternative undertaking as provided under the agreement, instead of securing title to the land, the purchaser would have secured a 10% equity in a joint venture company to which the land would have been transferred, while the vendor would have had a 90% equity therein. Presumably, the joint venture company would then have commenced development, and the purchaser would have received 10% of the profits from the sales whilst the vendor would have received 90% thereof. The point of central importance in this scenario would be that the purchaser would *not* be receiving *both* the land and profits. B C

Thirdly, in the events which transpired, what did happen, however, was that Tan Sri Khoo and the vendor did not honour either undertaking but the purchaser succeeded in forcing the hand of the recalcitrant vendor by way of a decree for specific performance, granted by the judge, and affirmed on appeal to the Supreme Court. The purchaser then went on, *suo motu*, to raise the balance of the purchase price on 31 December 1992 and to secure title to the land on 19 March 93, when the transfer had been registered. By then, according to the uncontradicted testimony of the vendor's chartered surveyor, Mr K Parampathy, the fair market value of the land had shot up to approximately RM120m. D E

At the end of the day, the purchaser got the land worth approximately RM120m, for which they had paid only RM47,939,958, *and in addition*, the judge had awarded it: (a) a sum of RM13.5m for loss of profits arising from anticipated sales of buildings on the land; (b) a sum of RM867,969 being loss of cash flow investments; (c) sums of RM31,000 and RM31,783.50 for wrongful termination of the agreement; and (d) a sum of RM1,756,772.91 by way of interest on the deposit which had been paid by the purchaser to the vendor under the agreement. And, with respect, what was overlooked by the judge was that the purchaser would now be in a position to make even more profits from sales at current rates. F G

In the result, the purchaser was placed in a far better position that it would have been if there had been due compliance by the vendor and Tan Sri Khoo, with their respective obligations, in 1988. This would be contrary to the fundamental principle of the role of the court when making an assessment of damages, namely, to ensure that the victim of a breach of contract is 'to be placed in the same situation ... as if the contract had been performed'. (See *Robinson v Harman* [1843–60] All ER Rep 383 at p 385; (1848) 1 Ex 850 at p 855; 154 ER 363 at p 365). H

Unfortunately, nowhere in his judgment did the judge direct his attention to the various scenarios outlined above, with the result that he did not consider the overall position of the parties as he undoubtedly should have. I

Conclusion

We need hardly add that in considering this appeal, and in particular, the grounds upon which an appellate court would be justified in interfering by reassessment of the damages, we have reminded ourselves of what Greer LJ had said in *Flint v Lovell* [1935] 1 KB 354 at p 360. He said:

> ... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

In other words, the two situations in which an appellate court would be justified in interfering by reassessment of the damages would be where the trial judge has acted on a wrong principle or has made an entirely erroneous estimate of the damages.

The statement of the law in *Flint v Lovell*, quoted above, was followed by the House of Lords in *Davies v Powell Duffryn Associated Collieries (No 2)* [1942] AC 601 (per Lord Wright, at pp 616–617 and per Lord Porter at pp 623–624) and also by the Judicial Committee of the Privy Council in *Nance v British Columbia Electric Rly* [1951] AC 601 at p 613.

For the various reasons adumbrated above, we are compelled to conclude, with respect, that the basis upon which the judge had assessed the various awards of damages cannot be supported in law having regard to the particular circumstances of the present case and the relevant authorities.

In the result, we would allow this appeal with costs, set aside the judgment of the court below and substitute, in lieu thereof, judgment for the purchaser for nominal damages only of RM10. There will, however, be no order as to costs in the court below because of the inconsistent positions taken by counsel for the vendor and Tan Sri Khoo before us as compared to that in the court below. In particular, *whereas* in the court below, counsel's primary contention was that some damages, other than nominal damages, though far less than had been claimed, ought to be awarded, before us, his primary contention was that only nominal damages should be awarded.

Deposit paid as security for the costs of the appeal to be refunded to the vendor.

Appeal allowed.

Reported by Prof Ahmad Ibrahim